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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-771

HECKETHORN MANUFACTURING CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

YOUNG & PERL
ARNOLD E. PERL
Memphis Bank Building
44 North Second Street
Suite 603
Memphis, Tennessee 38103
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Prayer	1
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Questions Presented	4
Statement of the Case	4
A. The Interrogation	5
B. The Threat	6
Reasons for Granting Writ of Certiorari	8
A. The court below has ordered enforcement of an order of the National Labor Relations Board predicated on the erroneous legal theory that mere interrogation of an employee is per se violative of Sec. 8(a)(1) of the National Labor Relations Act	8
B. The court below has approved a finding of the National Labor Relations Board predicated on an erroneous legal standard violative of the Petitioner's right of free speech	9
Conclusion	9
Certificate and Proof of Service	11
A. Order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Motion for Rehearing in Banc	A-1
B. Order of the United States Court of Appeals for the Sixth Circuit	A-2
C. Decision, Order, and Direction of Second Election of the National Labor Relations Board	A-4
D. Administrative Law Judge's Decision	A-8

Cases Cited

Acme Products, Inc. v. NLRB, 389 F.2d 104 (C.A. 8, 1968) 8

National Can Corp. v. NLRB, 374 F.2d 796 (C.A. 7, 1967) 8

NLRB v. A&S Electronic Die Corp., 423 F.2d 218 (C.A. 2, 1970) 8

NLRB v. P. R. Mallory & Co., Inc., 355 F.2d 509 (C.A. 7, 1966) 8

NLRB v. Sunnyland Packing Co., 369 F.2d 787 (C.A. 5, 1966) 8

NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941) 9

NLRB v. Welsh Industries, Inc., 385 F.2d 538 (C.A. 6, 1967) 8

NLRB v. Zimmox Coal Co., 336 F.2d 516 (C.A. 6, 1964) 8

Schenck v. United States, 249 U.S. 47 (1919) 10

Surprenant Manufacturing Co. v. NLRB, 341 F.2d 756 (C.A. 6, 1965) 9

Thomas v. Collins, 323 U.S. 516 (1945) 10

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) .. 8

Statutes Cited

U.S. Constitution, Amendment I 2

29 U.S.C., Sec. 151 et seq. 2, 3, 4, 8

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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

The Heckethorn Manufacturing Co., Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on October 22, 1974, and granting partial enforcement of an Order issued against Petitioner[1] by the National Labor Relations Board.

[1] Petitioner herein was designated as "Respondent" before the court below and before the National Labor Relations Board.

OPINIONS BELOW

The Order of the Court of Appeals (Appendix B, *infra*, p. A-2) is not yet officially reported. The Decision, Order, and Direction of Second Election of the National Labor Relations Board (Appendix C, *infra*, p. A-4) is reported at 208 NLRB No. 46.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was made and entered on October 22, 1974 (Appendix B, *infra*, p. A-2). The petition of Heckethorn Manufacturing Co. for a rehearing in banc was denied on November 22, 1974 (Appendix A, *infra*, p. A-1). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Sec. 10(e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 160(e) and (f).

STATUTES INVOLVED

U. S. Constitution Amend. I. "Congress shall make no law . . . abridging the freedom of speech . . ."

The National Labor Relations Act as amended (29 U.S.C., Sec. 151 et seq.), insofar as is pertinent provides as follows:

Section 7. "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, . . . and shall also have the right to refrain from any or all such activities . . ."

Section 8(a). "It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;"

Section 8(c). "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 10(a). "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair practice (listed in section 8) affecting commerce."

Section 10(c). "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice . . ."

Section 10(e). "The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of such order . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

QUESTIONS PRESENTED

I

Were the findings of the National Labor Relations Board that the Petitioner violated Section 8(a)(1) of the Act supported by substantial evidence on the record considered as a whole?

II

Does the legal standard applied to the Petitioner's conduct by the Board violate the Petitioner's right of free speech?

STATEMENT OF THE CASE

The Petitioner operates a manufacturing facility in Dyersburg, Tennessee, employing approximately 300 employees. This case arises out of alleged Employer misconduct preceding a Board conducted representation election held October 27, 1972, at the Petitioner's Dyersburg plant.[2] The petitioning union, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, filed post-election objections and two unfair labor practice charges against the Petitioner.[3] On April 12, 1973, the Board's Regional Director for Region 26 ordered the case consolidated for hearing and issued a complaint alleging violations of Section 8(a)(1) and (3) and Sec. 2(6) and (7) of the National Labor Relations Act, hereinafter referred to as the Act.

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[2] The designation assigned by the Board to the representation proceeding is Case No. 26-RC-4336.

[3] The initial charge was filed with the Board on November 14, 1972, and was designated as Case No. 26-CA-4544. The second charge was filed March 16, 1973, and was designated as Case No. 26-CA-4676.

Hearing was held before an Administrative Law Judge of the Board on May 1-4, 1973. The Administrative Law Judge's Decision (Appendix D, *infra*, p. A-8) issued on June 29, 1973, dismissing all allegations of Sec. 8(a)(3) violations and finding certain conduct of the Petitioner to be violative of Sec. 8(a)(1). The Judge further recommended that the election be set aside.

Timely exceptions to the Administrative Law Judge's Decision were filed by Petitioner and cross-exceptions by the Board's General Counsel. On January 10, 1974, the Board issued its Decision, Order, and Direction of Second Election (Appendix C, *infra*, p. A-4) significantly narrowing the scope of the Administrative Law Judge's findings and recommended order.

Thus, the tattered remnants of the General Counsel's original complaint came before the Sixth Circuit Court of Appeals on Application for Enforcement of the Board's order. The court below considered three alleged instances of unlawful employee interrogation and one alleged threat of job loss in the event the Union succeeded in organizing Petitioner's plant. (J.A. pp. 34-83).[4] The court in its order entered October 22, 1974 (Appendix B, *infra*, p. A-2) found two interrogations held unlawful by the Board to be non-coercive and denied enforcement with respect to them. The court enforced the Board's order *only* with respect to the two remaining allegations of unlawful conduct discussed below.

A. **The Interrogation**

The court below upheld the Board's finding that the Petitioner's production manager, Robert Strickland, engaged in un-

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[4] "J.A." refers to the printed Joint Appendix presented to the Circuit Court of Appeals. This document comprises a portion of the Certified Record forwarded to this Court by the clerk of the court below pursuant to Supreme Court Rule 21.

lawful interrogation of employee Fannie Mae Johnson within the prohibition of Sec. 8(a)(1) of the Act. (Appendix C, *infra*, p. A-4). The Board found that in the course of five conversations Strickland requested Johnson, an outspoken critic of the Union (J.A. p. 86), to ask two employees to cease openly campaigning for the Union and to ascertain the Union sentiment of three other employees (J.A. pp. 7, 8, and 30). Johnson, in testimony credited by the Board, testified that due to her long and close personal friendship with Strickland, she willingly complied with each of his requests (J.A. pp. 45-47). Indeed, Johnson felt sufficiently secure in her relationship with Strickland that she volunteered to him the information that *she* had signed a union authorization card (J.A. p. 47). Absolutely no evidence was adduced and the Board made no finding whatsoever that Strickland ever threatened Johnson, promised her a benefit for working against the Union, or even asked her how she stood on the question of the Union.

B. **The Threat**

The court below also upheld the findings of the Board relating to the alleged threat of job loss in the event of a Union victory (Appendix C, *infra*, p. A-4). The unlawful threat is alleged to have occurred during a conversation between Petitioner's Quality Control Manager, Walter Early, and employee Danny Ing (J.A. pp. 54-56). Early acknowledged in his testimony that on one occasion he engaged Ing in a conversation lasting approximately 20 minutes during which time he presented in detail his personal objections to the Union (J.A. pp. 76-77). Early, a veteran of five previous Union election campaigns, testified that he cautioned Ing about unrealistic promises made by the Union, argued that the Union cannot guarantee job security, stressed the fair wages and benefits already offered by the Company and warned of the uncertainties created by a strike (J.A. pp. 76-78).

In contrast to Early's detailed recollections, Ing could remember none of the details of the conversation except, "He stated a couple of facts about the union and said the company would do as much for us as they could, but if the union came in, he guaranteed there wouldn't be any jobs." (J.A. pp. 55, 56, 58).

The Administrative Law Judge,[5] in crediting Ing's testimony and finding a violation of Section 8(a)(1) stated, "*For a supervisor to initiate a union conversation with one of his employees on the eve of an election, and to spend 20 minutes expounding against the union is to invite the type of accusation here leveled at Early. I am of the opinion that Ing's testimony reflects his understanding of that which Early discussed during these conversations.*" (Appendix D, *infra*, p. A-17, emphasis supplied.)

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[5] The finding of the Administrative Law Judge concerning this issue was adopted *in toto* by the Board (Appendix C, *infra*, p. A-4).

REASON FOR GRANTING THE WRIT OF CERTIORARI

Assuming *arguendo* each of the Board's factual conclusions and credibility resolutions to be based upon substantial evidence, Petitioner's conduct still does not rise to the level of a violation of the Act. Thus, the court below, by ordering enforcement of the Board's order, has grossly misapplied the substantial evidence requirement of the Act and is thereby subject to review by this Court pursuant to the rule laid down in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

The Court Below Has Ordered Enforcement of an Order of the National Labor Relations Board Predicated on the Erroneous Legal Theory That Mere Interrogation of an Employee is Per Se Violative of Sec. 8(a)(1) of the National Labor Relations Act.

The Court below has in past proceedings adopted the well settled rule that interrogation, in order to constitute a violation of the Act, must actually interfere with, restrain, or coerce the employees. *NLRB v. Welsh Industries, Inc.*, 385 F.2d 538 (C.A. 6, 1967); *as applied in other circuits, NLRB v. A&S Electronic Die Corp.*, 423 F.2d 218 (C.A. 2, 1970); *NLRB v. Sunnyland Packing Co.*, 369 F.2d 787 (C.A. 5, 1966); *National Can Corp. v. NLRB*, 374 F.2d 796 (C.A. 7, 1967); *Acme Products, Inc. v. NLRB*, 389 F.2d 104 (C.A. 8, 1968). Whether a particular incident of interrogation is coercive depends upon the force and content of the actual conversation and upon the context in which the interrogation occurs. *NLRB v. Zimnox Coal Co.*, 336 F.2d 516 (C.A. 6, 1964); *NLRB v. P. R. Mallory & Co., Inc.*, 355 F.2d 509 (C.A. 7, 1966).

In the instant case, the element of coercion is utterly lacking in the conversations between Strickland and Johnson. These conversations occurred in the context of an exchange of confidences between close personal friends who share (as Strickland believed) a common attitude toward the Union. There is

undeniably an element of interrogation throughout those conversations; however, Johnson by her own admission truthfully and willingly cooperated with each of Strickland's requests (J.A. pp. 46-47). Thus, there was no coercion. In the absence of any record evidence that the interrogation of employee Johnson was accompanied by threats, intimidation, promise of benefit or other coercive treatment, the Board is without substantial basis for its finding of a violation of Sec. 8(a)(1) of the Act.

The Court Below Has Approved a Finding of the National Labor Relations Board Predicated on an Erroneous Legal Standard Violative of the Petitioner's Right of Free Speech.

The Board's finding that employee Danny Ing was unlawfully threatened is based upon the erroneous theory that where an employer undertakes to speak on the subject of a union prior to an election, it must bear the consequences for any "understanding" or belief by an employee that he has been unlawfully threatened. Thus predicated, the Board's finding violates the Petitioner's right of free speech guaranteed by the First Amendment and codified in Sec. 8(c) of the Act.

Early in the judicial history of the Act, this Court enunciated the principle that employers enjoy a First Amendment right to speak out in an attempt to persuade employees in regard to union affiliation. *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941). Sec. 8(c) was amended into the Act by Congress as an affirmative guarantee that the right of free speech will not be sacrificed through overzealous policing of rights created by the Act. Thus, there is required a delicate balancing of the employer's right of expression of opinion and prophecy with the employee's right to an uncoerced decision concerning union affiliation. *Surprenant Manufacturing Co. v. NLRB*, 341 F.2d 756 (C.A. 6, 1965).

In effecting the difficult and delicate balance of competing rights of this nature, this Court has traditionally insisted that

each case be judged strictly on the basis of the force and meaning of the *actual words* expressed. *Schenck v. United States*, 249 U.S. 47 (1919). In *Thomas v. Collins*, 323 U.S. 516 (1945), this Court expressly rejected application of a standard which placed "the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." (323 U.S. 535)

Clearly, in the instant case the Board lacked substantial evidence upon which to base objective findings that the actual words expressed by Early contained prohibited threats. Nevertheless, the Board found a violation of Sec. 8(a)(1) based upon the employee's "understanding" of what was said. Thus, the Board applied the same subjective standard emphatically rejected by this Court in *Thomas v. Collins*, supra.

CONCLUSION

For the reasons above expressed, specifically including the absence of substantial evidence supporting the Board's order as enforced by the court below and the threat posed thereby to Petitioner's right of free speech, the Petitioner submits that a Petition for Writ of Certiorari in the circumstances of this case should be granted.

Respectfully submitted

YOUNG & PERL

By: ARNOLD E. PERL
Memphis Bank Building
Suite 603
44 North Second Street
Memphis, Tennessee 38103
Attorneys for Petitioner

Certificate and Proof of Service

Pursuant to Supreme Court Rules, Rule 33(3), I, Arnold E. Perl, Attorney for Heckethorn Manufacturing Co., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of December, 1974, have caused to be served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States and on several parties thereto as follows:

1. The United States by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the National Labor Relations Board by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to Peter G. Nash, Esquire, General Counsel, at the Office of the National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570.

ARNOLD E. PERL
YOUNG & PERL
44 North Second, Suite 603
Memphis, Tennessee 38103
Attorneys for Heckethorn
Manufacturing Company

APPENDIX

APPENDIX A

No. 74-1316

United States Court of Appeals
For the Sixth District

National Labor Relations Board,
Petitioner,

v.

Heckethorn Manufacturing Co.,
Respondent.

ORDER

(Filed November 22, 1974)

Before: Phillips, Chief Judge; Celebrezze and Lively, Circuit Judges.

No judge in active service having requested a vote on the suggestion for rehearing en banc, this case has been referred to the panel which heard the appeal. Upon examination of the petition for rehearing the court concludes that the matters raised therein were considered by the court upon the original submission of the case. We find no error prejudicial to petitioner in the decision entered by this panel on October 22, 1974.

The petition for rehearing is denied.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

APPENDIX B

No. 74-1316

United States Court of Appeals
For the Sixth Circuit

National Labor Relations Board,
Petitioner,

v.

Heckethorn Manufacturing Co.,
Respondent.

ORDER

(Filed October 22, 1974)

Before: Phillips, Chief Judge; Celebrezze and Lively, Circuit Judges.

This case is before the court on application for enforcement of an order of the Board and cross-petition to review and set aside the order which is reported at 203 NLRB No. 46. The Board found that the Company had violated Section 8(a)(1) of the Act by coercively interrogating employees about their own and other employees' union activities and by threatening job loss if employees chose union representation.

Upon consideration of the record as a whole, we are of the Opinion that substantial evidence supports the finding as to violation of Section 8(a)(1), though we find no coercive interrogation in the conversations between foreman Simpson and employee Clark or supervisor Whittle and employee Rigsby

which were relied upon in part by the Administrative Law Judge and the Board.

It is therefore Ordered that enforcement of the Board's order is granted.

Entered by Order of the Court

s JOHN P. HEHMAN
Clerk

APPENDIX C

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On June 29, 1973, Administrative Law Judge Wellington A. Gillis issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusion of the Administrative Law Judge and to adopt this recommended Order, except as modified herein.[2]

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[1] The Respondent and General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

[2] We agree with the Administrative Law Judge that Respondent violated Sec. 8(a)(1) of the Act by interrogating and threatening certain employees, and that such conduct interfered with the exercise of a free and untrammelled choice in the election. We shall therefore set aside the election. However, we do not agree with the Administrative Law Judge that, in the context of this case, the exhibition of the film, "And Women Must Weep," constitutes either a violation of Sec. 8(a)(1) or a sufficient basis for setting aside the election. We shall revise his recommended Order and notice accordingly.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified, and hereby orders that Respondent, Heckethorn Manufacturing Co., Dyersburg, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified herein:

1. Delete paragraph 1(b) and redesignate paragraph (c) accordingly.

2. Substitute the attached notice for the Administrative Law Judge's notice.

It Is Further Ordered that the election in Case 26-RC-4336 conducted on October 27, 1972, be, and it hereby is, set aside, and that the case be remanded to the Regional Director for Region 26 for the purpose of conducting a new election in the appropriate unit at such time as he deems the circumstances permit the free choice of a bargaining representative.

Direction of Second Election

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 26 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which

commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[4] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (UAW).

Dated, Washington, D.C., January 10, 1974.

Edward B. Miller — Chairman

Howard Jenkins, Jr., — Member

John A. Penello, — Member

(Seal) National Labor Relations Board

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[4] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236; *N.L.R.B. v. Wyman-Gordon Co.*, 394 U. S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 26 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We Will Not coercively interrogate our employees concerning their union activities.

We Will Not threaten our employees with loss of jobs if the Union comes in.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

All our employees are free to become, remain, or to refrain from becoming, or remaining members of International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), or any other labor organization.

Heckethorn Manufacturing Co.
(Employer)

Date..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Clifford Davis Federal Building, Room 746, 167 North Main Street, Memphis, Tennessee 38103, Telephone 901-534-3161.

APPENDIX D

United States of America
Before the
National Labor Relations Board
Division of Judges
Washington, D. C.

Heckethorn Manufacturing Co. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)	Case Nos. 26-CA-4544 26-CA-4676
Heckethorn Manufacturing Co. Employer and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) Petitioner	Case No. 26-RC-4336

Lynn A. Agee, Esq., for the General Counsel.

Howard R. Paul, Esq., of Memphis, Tenn., for the Charging Party and Petitioner.

Arnold E. Perl, Esq. and Richard M. Kobdish, Esq., of Fowler, Young & Perl, of Memphis, Tenn., for the Respondent and Employer.

DECISION

Statement of the Case

Wellington A. Gillis, Administrative Law Judge: Upon separate charges filed on November 11, 1972, in Case No. 26-CA-4544 and on March 16, 1973, in Case No. 26-CA-4676, by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), hereinafter referred to as the Union or the Petitioner, the General Counsel for the National Labor Relations Board, hereinafter referred to as the Board, issued a consolidated complaint on April 12, 1973, against Heckethorn Manufacturing Co., hereinafter referred to as the Respondent or the Employer, alleging violations of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended (61 Stat. 136) hereinafter referred to as the Act. A timely answer to the consolidated complaint was subsequently filed by the Respondent wherein it denied the commission of any unfair labor practices.

In Case No. 26-RC-4336, based upon the representation petition filed by the Petitioner on August 28, 1972, and pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 26 on September 19, 1972, an election was held on October 27, 1972, among the production and maintenance employees employed at the Employer's Dyersburg, Tennessee plant.[1] Thereafter, on November 3, 1972, the Petitioner filed Objections to the Election. Subsequently, on December 14, 1972, the Acting Regional Director, after having conducted an investigation of the objec-

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[1] The Tally of Ballots issued by the Regional Director reveals that the Petitioner failed to receive a majority of the votes cast in the unit comprised of "All production and maintenance employees, including plant clerical employees and research lab technicians, employed at Heckethorn Manufacturing Company's Dyersburg, Tennessee plant, excluding all laid off employees, office clerical employees, watchman, guards and supervisors as defined in the Act."

tions, issued a Report on Objections. In his Report, the Acting Regional Director found that Objection 5 raised issues which may best be resolved on the basis of record testimony, and recommended to the Board that Objections 2, 6 and 7 be sustained, that Objections 1, 3 and 4 be overruled, and that the election be set aside and a second election be directed.

On January 9, 1973, the Employer filed timely exceptions to portions of the Report on Objections. On February 1, 1973, the Board issued its Order Directing Hearing, wherein it found that Objections 2, 5, 6 and 7 raised substantial and material issues of fact with respect to conduct affecting the results of the election and ordered that a hearing be held for the purpose of receiving evidence to resolve issues raised by the Employer's exceptions with respect to the Petitioner's Objections 2, 5, 6 and 7. Subsequently, on April 12, 1973, the Regional Director issued an Order consolidating Case No. 26-RC-4336 with Case Nos. 26-CA-4544 and 26-CA-4676, for the purposes of hearing, ruling, and decision by an Administrative Law Judge.

Pursuant to said Order and Notice of Hearing, a hearing on the consolidated complaint, as amended at the hearing, and on other representation matters alluded to above in Case No. 26-RC-4336, was held in Dyersburg, Tennessee on May 1-4, 1973. All parties were represented by counsel, and were afforded full opportunity to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, and to engage in oral argument.[2] Subsequent to the close of hearing timely briefs were submitted by counsel for the General Counsel and the Respondent.

Upon the entire record in this case, and based upon my observation of the witnesses, and their demeanor on the witness

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[2] At the outset of the hearing the undersigned denied the Respondent's Motion to Sever and Dismiss on procedural grounds Case No. 26-CA-4676, involving the Section 8(a)(3) allegations herein.

stand, and upon substantial, reliable evidence "considered along with the consistency and inherent probability of testimony" (Universal Camera Corp. v. N.L.R.B., 240 U. S. 474, 496), I make the following:

Findings and Conclusions

I. The business of the respondent

Heckethorn Manufacturing Co., a corporation with an office and plant located in Dyersburg, Tennessee, is engaged in the manufacture of ventilated seat cushions, and certain items for the United States Department of Defense. During the 12-month period immediately preceding the issuance of the consolidated complaint herein, the Respondent received goods and materials valued in excess of $50,000 directly from points outside the State of Tennessee. During the same period, the Respondent sold and shipped goods and materials valued in excess of $50,000 directly to points located outside the State of Tennessee. The parties admit, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The labor organization involved

The parties admit, and I find, that International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) is a labor organization within the meaning of Section 2(5) of the Act.

III. The alleged unfair labor practices and conduct affecting results of election

A. The issues

1. Whether, on one or more occasions during August, September and October 1972, the Respondent, through one or more of its supervisors, engaged in interrogation, threats, or other unlawful conduct within the meaning of Section 8(a)(1) of the Act.

2. Whether, in early October 1972, the Respondent withheld from its employees a customary annual wage increase and informed his employees that it was being withheld because of their union activity in violation of Section 8(a)(1) of the Act.

3. Whether, in exhibiting a movie to its employees entitled, "And Women Must Weep," the Respondent violated Section 8(a)(1) of the Act.

4. Whether, in failing or refusing since November 1972, to recall to their former positions of employment laid off employees Gaylon Pease and Bill Henry, the Respondent did so because of their having engaged in union activities in violation of Section 8(a)(3) of the Act.

5. Whether the results of the election conducted on October 27, 1972, among the Respondent's employees should be set aside.

B. The Facts

1. Alleged Section 8(a)(1) conduct

a. W.R. Heckethorn's speech

On October 2o, 1972,[1] the day before the election, W.R. Heckethorn, the Respondent's president, made a speech to his employees who were assembled in the plant cafeteria in groups of approximately 30 employees. During the course of discussing several matters, Heckethorn told his employees that there were very few people whom he totally disliked, but that G. E. Strickland, union representative, was one, and, reading from a prepared note card, stated that "As a Company we will abide by the law and bargain in good faith with the Union, but no law can make me like that man or sit down across the table from him." Seven employee witnesses for the General Counsel corroborated Heckethorn's testimony in this regard, several of whom also testified on cross-examination that it was clear that Heckethorn was talking about himself and not about the Company. As the General Counsel's own witness, employee Ivy Clark, testified, Heckethorn stated that if the Union won the election the Company would bargain in good faith and that he would turn over the job of negotiating to another company official. Thus, the record contains no credible evidence to support the General Counsel's assertion and the complaint allegation that, on this occasion, Heckethorn announced to the employees the Company's intention to refuse to bargain with Strickland in the event the Union was certified as the bargaining representative.

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[1] Unless otherwise noted, all dates hereinafter refer to the year 1972.

b. **Alleged conduct of Robert Strickland**

On several occasions during the months of September and October, Respondent's production manager, Robert Strickland, had conversations with employee Fannie Mae Johnson at her machine concerning employee union activities. During the first of these, when Strickland stopped by her work station Strickland asked Johnson to do him a favor and talk to employee Emma Koonce, to tell her to stop talking about the Union, that people on the second shift were pretty well satisfied with things as they were. Johnson, a close friend of Strickland, agreed to his request.

On the second occasion Strickland told Johnson that employee Lonny Powell was loud-mouthing about the Union, and attempting to get people to vote for the Union. Strickland asked Johnson to speak to Powell and see if she could stop him. Still a few weeks later, in October, Strickland asked Johnson if she knew how employee Joan Woodside felt about the Union, and then asked her to find out and let him know. Johnson again agreed.

On a fourth occasion in October, Strickland approached Johnson at her machine and asked her what had Louise Ketcherson so uptight about the Company and whether she were going Union. When Johnson answered that she did not believe this to be the case, Strickland asked her to find out for him and let him know. And again, on another occasion, about 2 weeks before the election, Strickland asked Johnson how employee Wilma Everston felt about the Union. Johnson, a relative of Everston, told Strickland that he would have to talk with Everston himself, as she would not have anything to say to her one way or the other about the Union. On each occasion, after talking with the employee involved, Johnson told Strickland that she had done so and reported to him what the employee had said.

Strickland admitted talking with Johnson on a number of these occasions concerning some of these employees, and receiving Johnson's report after talking with the employees, but testified they occurred in August before the election petition was filed, and that the discussions were instigated by Johnson, a close personal friend who volunteered to talk with the employee involved because of her concern about the union activities of other employees. Strickland admitted, however, relaying the information imparted by Johnson to other supervisors shortly after each occurred, including Personnel Manager Gerald Hamm.

Strickland's version of these conversations and the alleged motivation of Johnson for talking with the various employees does not ring true. The fact that Strickland made use of the information once received, coupled with a favorable impression of Johnson's demeanor while testifying, leads me to give credence to her testimony, including her recitation of the timing of the incidents. That such conduct is unlawful is obvious. I find, as alleged, that the Respondent through its supervisor, Bob Strickland, engaged in unlawful interrogation within the prohibition of Section 8(a)(1) of the Act.

c. **Alleged conduct of Ernest Simpson**

Approximately 1 month before the election, placing it during the latter part of September, employee Ivy Clark went to Foreman Ernest Simpson's office to get a band-aid. While there Simpson, in a polite way asked him what he thought about the Union. Clark replied that he did not think that he had anything to worry about, that he had heard only a couple of people say anything about it. As Simpson did not testify, Clark's testimony as to this stands unrefuted. Isolated or not, no justification exists for Simpson's conduct in querying Clark about the Union

in the confines of his office shortly before an election. I find, as alleged, that such interrogation is unlawful and violative of Section 8(a)(1).[4]

d. **Alleged conduct of Marvin Early**

A week or so before the election, Marvin Early, manager of quality control, approached employee Danny Ing in the warehouse. Early stated to Ing that he always thought that he was a pretty smart boy until then, mentioned the Union, and volunteered that the Company would do so as much for the employees as it could but "If the Union came in he guaranteed there wouldn't be any jobs."

A day or so later, in the Projectile Department, in talking with Ing again, Early said that he thought this year the employees would get the best pay raise they had received in a long time. Later, in passing by, Early said to Ing, "Think about it, Danny."

Early admitted bringing up the subject of the Union with Ing on one such occasion, stating that he would like to talk to him about the Union, and then, for about 20 minutes, giving Ing the benefit of his thoughts against the feasibility of having a union at Heckethorn. In testifying in detail as to what he did tell Ing, Early denied the specific remarks attributed to him by Ing. With respect to the crucial one, Early's version is that he told Ing that the Company would do as much for the employees as it was able to do "without any outside pressure," and that "The Company would not be put in a position of being forced into bankruptcy by having to pay higher wages than it was able to pay." Early, when questioned on cross-examination, admitted

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[4] I do not find, however, as alleged in the same paragraph of the complaint, that this interrogation created the impression of surveillance.

that if the Company were forced into bankruptcy this would mean a loss of jobs. I credit Ing's testimony as to these conversations.

For a supervisor to initiate a union conversation with one of his employees on the eve of an election, and to spend 20 minutes expounding against the union is to invite the type accusation here leveled at Early. I am of the opinion that Ing's testimony reflects his understanding of that which Early discussed during these conversations. Accordingly, in crediting Ing, I find that Early engaged in conduct constituting an unlawful threat of loss of jobs if the Union came in, clearly a violation of Section 8(a)(1) as alleged in the complaint.

e. **Alleged conduct of Clyde Whittle**

A week or two before the election, Foreman Clyde Whittle talked with employee Thomas Rigsby in the plant. After asking him whether he thought the Company needed a union, Whittle related his experiences while working at American Metals in Union City, which involved the necessity of employees having to look for other employment because the Union, the same one involved here, had gone out on strike. Whittle was not called as a witness, and therefore Rigsby's testimony stands unrefuted. In finding that Whittle, on this occasion, did interrogate Rigsby concerning whether he thought the Company needed a union as alleged in the complaint, I also find, consistent with Rigsby's denial on cross-examination, that Whittle did not threaten him with the loss of his job if the Union came in. It is recommended that the portion of the complaint alleging a threat on the part of Whittle be dismissed.

f. **"And Women Must Weep"**

Approximately 1 week before the election, Lloyd Kelt, Respondent's Director of Personnel and Planning, exhibited to

employee departmental groups of 30-35 employees the movie entitled, "And Women Must Weep." On this day, between 7 a.m. and 4 p.m., employees were advised by their supervisors to go to the cafeteria, where they were told that the film represented a situation that occurred at the Perfect Circle Co. in Princeton, Indiana, that professional actors were used, and that it was not the actual representation and was not the same union. The employees were then told that their viewing of the film was voluntary, and that anyone who did not wish to see it was free to leave. Of 280 or 290 employees, 1 employee left. After each viewing,[5] Kelt told the employees that the movie reminded him of a situation in which C. E. Strickland (union representative) was involved at Union City, and that the only guarantee that they had that this situation might not occur at Heckethorn was to vote "no" in the election the next week. At that point, the employees returned to their work stations.

While it is recognized that the exhibiting of the film "And Women Must Weep" is not a per se violation of the Act,[6] a split Board does hold that, against a background of demonstrated union animus and the presence of other unlawful conduct by the employer, its showing constitutes a violation of Section 8(a)(1) of the Act.[7] Apart from the unlawful interrogation and threat by Respondent's supervisors herein found, the

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[5] It was stipulated by the parties that the movie involved is the same movie, "And Women Must Weep" to which the Board referred in *Spartus Corporation*, 195 NLRB No. 17, and *Luxuray of New York, Division of Beaunit Corporation*, 155 NLRB 100.

[6] In fact, by itself, the showing of the film has been held, and properly so, to be an exercise of the right of free speech protected by Section 8(c) of the Act. *Southwire Company v. N.L.R.B.*, 383 F. 2d 235 (C.A. 5).

[7] *Southwire Company*, 159 NLRB 394; *Hawthorn Company*, 166 NLRB 251; *Luxuray of New York, Division of Beaunit Corporation, supra; Speed Queen, a Division of McGraw-Edison Co.*, 192 NLRB No. 142.

extensive campaign literature distributed by the Respondent in the form of leaflets simultaneous with the showing of the film, while not unlawful in itself, makes reference to problems created by unions and the extensive difficulties faced by striking employees. One such leaflet, for example, contains the admonition that "IF THE UNION STRUCK to try to force us to agree to their demands, you could be replaced by a new employee—that's what happened to 'Slick's' strikers at Union City."[8]

This, coupled with the Respondent's continued reference in its literature and at the conclusion of each showing of the film to the violent American Metals strike situation some years back at nearby Union City and the possibility of this occurring at Heckethorn, clearly demonstrates the union animus of the Respondent. Predicated upon Board precedent,[9] I find under the circumstances that the Respondent's showing of the film "And Women Must Weep" a week before the October 27 election is violative of Section 8(a)(1) of the Act.[10]

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[8] The "Slick" alluded to above, and throughout the various leaflets distributed by the Company, is C. E. Strickland, the union representative involved in the organizing campaign at the Respondent's plant.

[9] *Inter alia*, see *Spartus Corporation, supra*, and *Luxuray of New York, Division of Beaunit Corporation, supra*.

[10] For the view, shared by Chairman Miller among others, that free speech is not rendered unprotected by other improper conduct, see the court decisions in *Southware Company v. N.L.R.B., supra; N.L.R.B. v. Hawthorn Company*, 404 F. 2d 1205 (C.A. 8); *Kellwood Co. v. N.L.R.B.*, 434 F.2d 1069 (C.A. 8); *Luxuray of New York, Division of Beaunit Corporation v. N.L.R.B.*, 447 F. 2d 112 (C.A. 2).

g. Withholding of annual wage increase

Going back at least to 1964, each fall the Respondent has granted a general wage increase to its employees.[11] In 1972, the period here under consideration, the Respondent admittedly held up the granting of the annual wage raise until after the holding of the October 27 election. By letter given out to all plant employees, dated October 30, Heckethorn noted the favorable results of the balloting, expressed his appreciation for the vote of confidence, indicated that he would continue to do his best to provide jobs and paychecks for them in the future, and stated that "—Now that the election is over—I am pleased to announce a wage increase of 20 cents per hour, retroactive to October 2, 1972."

Testimony by several employee witnesses indicates that they had expected the raise to be granted around the first of October. Testimony from these same employees also indicates that it was commonly known that it was the Company's position that it would have been illegal to grant the increase while an election was pending, and in fact, could have been considered a bribe to have granted it before the election. Employees Rigsby and Edna Fulcher testified that Foreman Whittle and Arthur Cook, respectively, told them that if the Company were to grant the wage increase before the election it could be considered bribery.

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[11] Company records reflect that such increases were granted as follows:

November 1, 1964	September 29, 1969
December 3, 1965	October 5, 1970
October 3, 1966	November 15, 1971
October 30, 1967	November 3, 1972
September 30, 1968	

In 1965 and 1972, Board elections having been conducted in both years, the increases were made retroactive to November 1 and October 2, respectively.

A resolution of whether, in holding up a wage increase until after the election, an employer violates the Act, is most difficult under existing Board cases. On the one hand, the Board rules that an employer's legal duty is to proceed as he would have done had the union not been on the scene. Thus, in Gates Rubber Company, 182 NLRB 95, the Board found the company, which had withheld increases that normally would have been granted but for the presence of the union and the pendency of the election, to have violated the Act. In a later case, The Singer Company, Friden Division, 199 NLRB No. 162, the Board reversed the Trial Examiner who had followed this rationale and had had found that promotions had been uulawfully withheld on the ground that the company would have granted them but for the advent of the union.

On the other hand, it is extremely difficult for an employer to so proceed, i.e., as if the union were not in the picture, for, under a long line of cases, to do so and to grant benefits during the pendency of an election an employer risks being charged with interference with the election, as well as with unfair labor practice conduct.

In the present case, three things stand out. One, the facts reveal that, while the Company had made no promise of a wage increase in 1972, at some point between the end of September and the first of December each year for the prior 8 years the Company had granted a general wage increase. Two, the 1972 increase, as in 1965, admittedly was held up until after the election because of the Company's position that to do otherwise would have been illegal and could be considered a bribe, a position known to the employees. And three, there is no credible evidence indicating in any way that the Company used the increase postponement to influence the employees in the election, or that the Respondent's decision to withhold was calculated to do so.[12]

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[12] The only testimonial assertion to the contrary is discredited, as hereinafter noted.

The facts are not totally unlike those present in The Great Atlantic & Pacific Tea Company, Inc., 192 NLRB No. 83, where there had been no promise of a wage increase and the employees simply were aware that increases had been given in the spring of previous years, the Board holding therein that the postponement of the wage increase without an explanation therefore and at a time when the union's organizing campaign was about to be resolved in an election was not violative of the Act. The important factor here, as in A & P and in The Singer Company, where the Board, in finding no violation, relied upon the fact that the employer had not withheld reclassifications in the context of antiunion propaganda, is that there is no indication that the Company intended the withholding of the wage increase to have an effect upon the outcome of the election, or that the employees believed such to have been the case.

While in the cited cases the Board upheld its determination on several factual grounds, in each it concluded with what I consider the true test in this area. Thus, in A & P the Board closed by stating, "In reaching this conclusion we specifically note that there is no evidence to indicate that Respondent in any way sought to capitalize on the absence of a wage increase by connecting the absence with the union or the employees' support of the union." And, in The Singer Company, it concluded, "In the circumstances, we do not believe that the employees could reasonably conclude that the employer's postponement of promotions or reclassifications was intended to influence organizational activities. . . . "

The Respondent herein, I find, satisfies both of these tests. Accordingly, I find that in withholding its annual wage increase until after the October 27 election and making it retroactive to October 2 the Respondent did not violate Section 8(a)(1) of the Act.

h. **Alleged conduct of Cooley Cook**

Employee Lois Taylor testified that around October 1, while at their work table with several other employees, employee Imogene Myers asked Supervisor Cooley Cook why the employees were not getting the pay raise. Cook allegedly replied "If you hadn't started this damn s - - - you would have already got it." Lois Taylor could not recall who the other employees were. As to this asserted incident, Shirley Taylor also testified that Cook made this reply to Myers. Cook denied making such a statement. I credit Cook's denial. First, because I felt he testified truthfully. Second, because Lois Taylor, admittedly one of the leading union adherents, did not mention this incident in either of her two affidavits given to Board agents at the time of their investigating this matter and unconvincingly testified that she did not because the Board agent asked only if anyone had said something to her about a wage increase.[13] Thirdly, because Shirley Taylor, when finally pinned down on cross-examination after being confronted with her affidavit, reluctantly contradicted Lois Taylor, testifying that Lois Taylor was not present when Cook allegedly made the remark. Apart from the existence of other reasons for discrediting both Taylors and the fact that not until after the hearing had opened was the complaint amended to encompass this asserted incident, I find the story to have been a fabrication and that Cook did not make the statement attributed to him. Accordingly, the complaint allegation in this regard was not proved.

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[13] Other of her testimony on this was not worthy of belief. Indeed, my appraisal of Lois Taylor is that, had the statement in fact been made by Cook or anybody else, she would have jumped at the opportunity to volunteer the information during her investigative interview.

2. **Alleged Section (8)(a)(3) conduct**

In early January 1972, Billy Henry and Gaylon Pease, the two alleged discriminatees herein,[14] with a few other employees attended a union meeting at the Holiday Inn. Pease, who had obtained some 200 union authorization cards from Organizer C. E. Strickland, gave out cards to a number of the employees, including about 50 to Henry.[15] Subsequently, Henry and Pease passed out cards to employees, each successful in signing up about 30 employees. This activity took place at the plant at different times throughout the work day.

In addition to passing out cards and attending a few additional meetings at Pease's home, Henry testified that both he and Pease jokingly asked Supervisors Cooley Cook and Clyde Whittle on a number of occasions if they wanted a union card to fill out, each one jokingly refusing the offer.[16] It is also apparent from Henry's testimony that three-quarters of the employees in the toolroom, where Henry and Pease worked, signed union cards and that one half of them spoke out openly on behalf of the Union.

Pease also testified that one evening in early February, as he and Henry were leaving the plant, he approached Foreman Gerald Cole on a nonunion matter. During the conversation Cole said that he had heard that he (Pease) was working for the Union and wondered what the possibilities were of a union coming into the plant. Pease replied that he thought they were

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[14] The alleged discrimination as to both employees involves the Respondent's failure to recall them in and since November 1972, following a plant-wide economic layoff the prior February.

[15] Other employees receiving and subsequently distributing cards were John Bradley, on the second shift, Thomas Rigsby, and James Ramsey.

[16] Pease testified that Whittle, who had indicated to Henry that he was in favor of the Union, accepted a card from him.

good and that he intended to work hard to see that one did. On another occasion in early February at a local cafe, according to Pease, Foreman Ernest Simpson asked Pease why he was working for a union. Pease answered that he believed in unions, that he had been a member of the UAW in the past, and that he felt Heckethorn needed one because of the working conditions in the plant.[17]

It is apparent that the Company was aware of the fact that both Henry and Pease were union adherents, and I so find. However, there is no evidence that the Company was knowledgeable as to the extent of their activities on behalf of the Union, or that they were any more active than some of the other employees.

a. **Refusal to recall Gaylon Pease**

Gaylon Pease was employed by the Respondent as a Class "B" tool and die maker in the Tool and Die Department from April 1969 until the mass general layoff on February 25, 1972. At the time of the plant-wide layoff the Tool and Die Department employed approximately 25 employeees under department supervisor, Bill Hudson, 13 of whom were caught in the economic layoff. Pease, like the rest of the employeees, was advised of this by way of a letter handed to him the day before. Pease was also notified of the layoff at that time by Hudson's boss, Chief Engineer William Dowling, who gave Pease a very fine letter of recommendation.

The following Monday, February 28, Pease went to work at Phillips Tool & Die Company, Halls, Tennessee, some 11 miles from Dyersburg, procuring the job through his friend

[17] As neither of these incidents, relied upon by the General Counsel to establish Company knowledge, is alleged in the complaint as a violation, I make no finding with respect to them.

and owner, Odis Phillips. Pease remained at Phillips Tool & Die for about 8 weeks, when, toward the latter part of April he moved to Memphis, Tennessee, where he went to work for Craft Machine Co.

Pease stayed at Craft Machine in Memphis until November 6, when he left and went back to Phillips Tool & Die. He remained at Phillips until January 1973, when he went to work at Oldberg Manufacturing Co., where he was employed at the time of the instant hearing.

Having received word on Tuesday, November 7, that the Company needed to recall two tool and die employees right away, Gerald Hamm, employment manager, and Bill Hudson went through a complete list of tool and die employees who were on layoff by seniority with the Company.[18] After contacting or attempting to contact on November 9 and 10 according to seniority all of the 11 employees then on layoff status, Hamm and Hudson recalled Charles Edens, a Class "B" tool and die man, and Dorman Beard, a Class "A" machinist, both of whom reported for work the following Monday, November 13.

In going down the list, after contacting William McGuire, who had top seniority, and being turned down, Hudson attempted to call Pease, the second high man on the Class "B" tool and die list.[19] He used the telephone number listed on the Company personnel records and the last known number the Company had for him, receiving a recording indicating that the number reached was not in service. Hamm took the

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[18] Of the 13 employees laid off on February 25, Joe Webb, the employee with the most seniority, had been recalled the prior April 24, and Billy Henry, for reasons hereinafter set forth, was not considered for recall.

[19] McGuire, the record reflects, like Pease, was known to be an outspoken union adherent.

telephone and called the operator, and was told that the telephone had been disconnected. Hamm then asked if she had another number for him and was told that she did not.

At this point, Hamm and Hudson recalled that in July Mrs. Pease had been to the plant inquiring about a workmen's compensation check and indicated then that she was leaving the area, but had refused the Company's request to leave a forwarding address. They also recalled at this time that they had learned indirectly from one of their employees early in September that Pease no longer was employed at Phillips Tool & Die and had moved to Memphis. Thus, without knowledge of Pease's whereabouts or how to get in touch with him, coupled with a current need to fill the two positions, the two company officials went to the next man on the list.

The record contains considerable testimony relating to Pease and his whereabouts during this period, as well as conjecture as to what the Company might have done in the way of increased efforts to locate Pease on November 9. The long and short of it, however, is that by his own admission, when Pease left the Respondent's employment he severed all connections with the Company and with everyone else in the Dyersburg area, and did so with intent. Thus, even before leaving Heckethorn, Pease had had his telephone taken out and had given the Company no new telephone number. Upon moving to Memphis he did not have a telephone and purposely gave no one his address or his office number, because "I was trying to keep my particular address in Memphis as quiet as possible."[20]

Pease did claim that he had called Hudson and Hamm on several occasions between the layoff and the date of recall in-

[20] Pease admitted that he had a substantial amount of debt during this period and that he was not interested in his creditors knowing his whereabouts. He also had separated from his wife while in Memphis, taking a separate apartment, and wanted to keep this quiet.

quiring about the possibility of recall. I discredit his testimony in this regard completely. First, it is incongruous that, had he talked with them he would not have told them how to reach him,—as he so testified at one point. Secondly, he contradicted his earlier affidavit in this regard, in which he had stated that the subject of recall did not come up during two particular conversations with Hamm and with Hudson. Further, Pease changed his testimony several times while on the witness stand, and contradicted his pretrial affidavit with respect to two matters. Finally, Hamm and Hudson, both of whom testified in a forthright manner, denied ever talking to Pease during this period concerning recall, Hudson specifically refuting Pease's testimony that he recalled Hudson to tell him that he was working at Craft Machine in Memphis. I credit Hudson's testimony that at no time did Pease ever tell him he was in Memphis.[21]

Thus, it is abundantly clear, even admitted by Pease, that at no time during the layoff period did he submit to the Company either a mailing address or a telephone number where he could be reached in the event of a recall. Under these circumstances, I find that the Company did all that it could reasonably be expected to do at the time, particularly with its awareness that Pease had in fact left the area.[22] I find that the General Counsel has failed to prove by a preponderance of the

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[21] Hudson credibly testified that the only telephone call he ever had from Pease was one to his home about 6 weeks after the layoff when Pease called him to obtain the telephone number of employee Buddy Hassell in connection with a problem at Phillips, during which conversation no mention was made of recall. I do not credit Pease's testimony on crucial matters to the extent that it is not corroborated by other credited testimony.

[22] Hamm and Hudson had the same experience with two other employees on the list, John Bradley and James Rushing, whom they could not reach because of their telephones having been disconnected, with no further attempts made to contact either of them.

credible evidence that, in failing to recall Gaylon Pease in November or since, the Respondent violated Section 8(a)(3) of the Act.

b. **Refusal to recall Billy Henry**

Billy Henry first went to work for the Respondent on September 23, 1968, spent a hitch in the Army between August 1969 and May 1971, and returned to his Class "A" Machinist job in the tool and die department in August 1971 where he was employed at the time of his layoff on February 25, 1972.

On Thursday, February 24, Henry, along with other employees, was personally informed of the layoff by Chief Engineer Dowling, who that week was substituting for department foreman, Hudson. The following day, Dowling made assignments to both William McGuire and Henry, each one charged with doing a special machine job. Although each involved a piece of steel approximately 8 inches by 6 inches in size, they were different projects based upon a different set of blueprints. During the course of the day Henry was observed by three people stamping on the side of his metal block. Later, at one time or another, all three, employees Lawrence Hassell and Thomas Jones, and Supervisor Dowling, saw Henry's piece in the grinding room, with the inscription "F— you, White Eyes" imprinted on the side.[23] Still later, when Hudson returned to the plant, Dowling told Hudson to go into the grinding room to see what Bill Henry had left him. Upon looking at it, Hudson's reaction was "the man that did this will not be coming back to this Company as long as I'm here."[24]

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[23] This was a vulgar and uncomplimentary term used by many of the employees in referring to Hudson.

[24] Hudson was also apprised the following Monday by Hassell of the fact that Henry had done the stamping on the block.

The record contains considerable testimony on this matter, some of which would indicate that it was McGuire rather than Henry who was guilty of the act. Henry testified that he did not do it and McGuire testified that he (McGuire) stamped "White Eyes M. F." on his block. In this regard it would appear that McGuire, a strong union adherent who subsequently said "hell, no" to Hamm's offer of recall, was attempting to take the blame for the insubordination. First, four witnesses, whom I find to be credible, testified that the block they saw had "F— you, White Eyes" or "F— you, White Eyes, M.F." on it. McGuire denied stamping this language on his plate. Secondly, contrary to the testimony of Henry to the effect that he did no stamping that day, three of these witnesses testified that they saw Henry stamping and also testified that they saw no one else stamping. Thirdly, Hassell, whom I credit, testified that just before the shift ended at 3:15 p.m., he saw McGuire's block and nothing had been stamped on it. Finally, some time later on, after Henry learned that he was being charged with stamping this foul language on the block, he at no time, even at McGuire's suggestion, went to the Company to deny that he was the person responsible. Henry, on several occasions while testifying, changed his testimony on important matters. I was not convinced then or now that his testimony reflects the truth.[25]

Shortly after this incident Hudson apprised Hamm of what had occurred, indicating that Henry would not be recalled, and telling Hamm that, if he ever should be, he (Hudson) would leave. Thus, on November 9, when Hamm and Hudson

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[25] In this regard, unexplained to my satisfaction is the fact that, during the investigation of earlier charges in this matter and at a time when Henry was aware of the Company's asserted reason for not recalling him, in neither of two affidavits given by Henry to the Board did he mention the assertion that it was McGuire who was the person responsible for the obscene stamping.

made up the list of laid off employees eligible for recall, Henry was left off.[26]

The following night, having heard of the recall, Henry called Hudson and asked him about his chances of being called back. Hudson let him know that anyone who used derogatory remarks about him in public like that would not be called back by him. According to Hudson, whom I credit, Henry admitted that he had made the derogatory remarks, apologized, and asked Hudson if there were any way he could make it up. Hudson replied that, as far as he was concerned, there was no way, but it was all right with him if he wanted to go over his head to Kelt or Dowling.

On Monday, November 13, Henry went to see Dowling, who told him that he had talked with Hudson and that he agreed with him that Henry would not be recalled because of the note to Hudson that he had left on his project the last day of work. In reply to Henry's inquiry concerning a letter of recommendation, Dowling said he could not give him one. Henry then asked whether, in the event someone should call, Dowling would refrain from telling him about the part. Dowling replied that in such event he would only answer what he was asked.[27]

Whether or not, as asserted by the General Counsel, the Company's refusal to recall would appear to be harsh treat-

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[26] It is conceded that, had Henry been subject to recall, as senior man in his classification on layoff he would have been called back.

[27] Henry testified that during this conversation, Dowling, who acknowledged having talked with Hudson, told him that he was not being recalled because of the parts that he had scrapped out and the bad taste that he and Pease had left in the Company's mouth. Apart from a lack of corroboration on this by Dowling, on cross-examination Henry clarified this by testifying that he supposed Dowling was talking about the way "both of us talked about Hudson." Henry acknowledged that nothing was said concerning the Union.

ment for an incident such as this, such a determination is not before us. If in fact, as I find, it is the real reason for the Respondent's decision, and is not motivated by discriminatory considerations, as I also find, its justification or lack thereof is of no moment. Under all the circumstances, I find that the General Counsel has failed to prove by a preponderance of the credible evidence that, in refusing to recall Billy Henry in November or since, the Respondent violated Section 8(a)(3) of the Act.

IV. **The objections to the election**

As heretofore set forth, the Petitioner filed timely objections to the election and, following the Acting Regional Director's issuance of a Report on Objections, the Employer filed timely exceptions to portions of his Report. The Board thereafter issued its Order Directing Hearing in which it ordered that a hearing be held for the purpose of receiving evidence to resolve issues "raised by the Employer's exceptions" to the Report with respect to Objections 2, 5, 6, and 7. These objections are as follows:

> 2
>
> The Company President stated in his captive audience meeting of October 26, 1972, that he would not negotiate a contract with the Union if it was voted in.
>
> 5
>
> Supervisors interrogated, threatened, and harrassed [sic] employees as to their union sentiments.
>
> 6
>
> The Company withheld a pay increase due the employees on or about October 1, 1972.

7

> Throughout the use of films, literature, and speeches the Company ran a campaign of fear based on strikes and violence, and subsequent loss of jobs if the Union was voted in.

The Employer's exceptions attacked the Acting Regional Director's refusal to hold a hearing on Objections 2, 5, 6, "and the portion of Objection 7 dealing with the showing of the film," "And Women Must Weep."

Having found that Company President W. R. Heckethorn, in his speech to employees on October 26, 1972, did not state that the Company would not negotiate a contract with the Union if it were voted in, and, in fact, stated just the opposite, I shall recommend that Objection 2 be dismissed. Having found that the Employer, in withholding its wage increase until after the election, did not engage in unlawful conduct, I shall recommend that Objection 6 be dismissed.

Having found, however, in showing the film, "And Women Must Weep," when viewed against the background of demonstrated union animus and the presence of other unlawful employer conduct, that the Employer engaged in Section 8(a)(1) conduct, I find that such interferes with the exercise of a free and untrammelled choice in an election, and therefore that there is merit to that portion of Objection 7. Having further found that Supervisors Robert Strickland, Ernest Simpson, and Clyde Whittle engaged in unlawful interrogation of employees, that Superviser Marvin Early engaged in conduct constituting an unlawful threat of loss of jobs, and that such conduct occurred subsequent to the filing of the representation petition, I find that such conduct also interferes with the exercise of a free and untrammelled choice in an election, and that there is merit to Objection 5. Accordingly, I shall recommend that the repre-

sentation election held on October 27, 1972, in Case No. 25-RC-4336, be set aside.

Upon the basis of the above findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. Heckethorn Manufacturing Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning their union activities, threatening their employees with loss of jobs if the Union won, and showing the film, "And Women Must Weep," the Respondent interfered with, restrained and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

V. **The effective of the unfair labor practices upon commerce**

The activities of Respondent set forth in section III, above, occurring, in connection with the operations of Respondent described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. **The remedy**

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and that it take certain affirmative action which is necessary to effectuate the policies of the Act.

Upon the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[25]

ORDER

The Respondent, Heckethorn Manufacturing Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their union activities and threatening employees with the loss of jobs if the Union won the election.

(b) Showing the movie "And Women Must Weep" to its employees.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form, join or assist any labor organization, and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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[25] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in conspicious places at its Dyersburg, Tennessee plant, including all places where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[29] Copies of said notice, on forms provided by the Regional Director for Region 26, shall, after being duly signed by an authorized representative of the Respondent, be posted by it, as aforesaid, immediately upon receipt thereof and maintained for at least 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Decision, what steps the Respondent has taken to comply herewith.

It Is Ordered that the complaint herein be dismissed so far as it alleges violations of the Act not specifically found.

It Is Recommended that Objections 2 and 6 be dismissed as without merit.

It Is Further Recommended that Objections 5 and 7 be sustained, and that the representation election held on October 27, 1972, be set aside.

Dated at Washington, D. C.

(s) Wellington A. Gillis
Administrative Law Judge

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[29] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

(Seal) (Seal)

Notice to Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We Will Not interrogate our employees concerning their union activities.

We Will Not threaten our employees with loss of jobs if the Union comes in.

We Will Not show the movie, "And Women Must Weep" to our employees.

We Will Not in any like manner interfere with, restrain or coerce our employees in the exercise of their Section 7 rights.

All our employees are free to become, remain, or to refrain from becoming or remaining, members of International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), or any other labor organization.

Heckethorn Manufacturing Co.
(Employer)

Dated..... By .....
(Representative) (Title)

This is an Official Notice and Must Not Be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by ony other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Clifford Davis Federal Building, Room 746, 167 North Main Street, Memphis, Tennessee 38103. Telephone (901) 534-3161.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-771

HECKETHORN MANUFACTURING CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

On October 27, 1972, the National Labor Relations Board conducted a representation election among the production and maintenance employees at the petitioner Company's munitions plant in Dyersburg, Tennessee (Pet. App. D, p. A-9). The Union[1] lost the election and filed timely objections and unfair labor practice charges based on the Company's pre-election campaign. After a hearing before an Administrative Law Judge, the Board found that the Company had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by coercively interrogating employees and by threatening them

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[1]International Union, United Automobile, Aerospace & Agricultural Implement Workers of America.

with job loss because of their union activities (Pet. App. C, p. A-4; Pet. App. D, pp. A-14 to A-17). The Board set aside the election, directed a second one and entered an appropriate remedial order (Pet. App. C, pp. A-5 to A-6).

The unfair labor practice conduct relating to coercive interrogation involved two separate requests by Production Manager Robert Strickland to employee Fannie Mae Johnson that she "silence" pro-union employees, three requests by Strickland that Johnson ascertain and report to Strickland the union sympathies of other employees (Pet. App. D, pp. A-14 to A-15), and interrogations of employees Clark and Rigsby by Foremen Simpson and Whittle, respectively (Pet. App. D, pp. A-15 to A-16, A-17). The unfair labor practice conduct relating to threats of job loss involved warnings by Quality Control Manager Marvin Early to employee Danny Ing that the Company would do as much for the employees as it could, but "[i]f the union came in, he guaranteed there wouldn't be any jobs" (Pet. App. D, pp. A-16 to A-17).

The court of appeals found substantial evidence supporting the Board's findings of unfair labor practices and enforced its order, except with regard to the interrogations of employees Clark and Rigsby (Pet. App. B, pp. A-2 to A-3).[2]

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[2]In concluding that there was substantial evidence to support the Board's finding of violations of Section 8(a)(1) and granting enforcement of the Board's order, the court stated that it found "no coercive interrogation in the conversations between foreman Simpson and employee Clark or supervisor Whittle and employee Rigsby which were relied upon in part by the Administrative Law Judge and the Board" (Pet. App. B, pp. A-2 to A-3).

1. Petitioner contends (Pet. 8-9) that Strickland's interrogation of Johnson did not violate the Act because there was no showing that the interrogation actually restrained or coerced Johnson. However, the ultimate test of a Section 8(a)(1) violation is not whether "any employee was in fact intimidated or coerced by the [employer's] statements" (*National Labor Relations Board* v. *Electric Steam Radiator Corp.*, 321 F.2d 733, 736 (C.A. 6)), but whether the employer's conduct "tends to interfere with the free exercise of employee rights under the Act." *National Labor Relations Board* v. *Ford*, 170 F.2d 735, 738 (C.A. 6). *National Labor Relations Board* v. *Welsh Industries, Inc.*, 385 F.2d 538 (C.A. 6), upon which petitioner relies (Pet. 8), is not to the contrary, for the court in *Welsh* did not hold that an interrogation must actually coerce, but only that "[t]o offend the Act, interrogation must rise to the level of coercion or restraint." *Id.* at 540.

Accordingly, the only issue actually presented is whether substantial evidence supports the Board's finding that the interrogation of employee Johnson tended to be coercive. That issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, there is ample support in the record for the Board's finding (Pet. App. D, pp. A-14 to A-15).[3]

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[3]Petitioner's factual assertions (Pet. 6, 8-9) concerning the interrogation, *e.g.*, employee Johnson's alleged initiation of the incidents and her hostility to the Union, are based on the discredited testimony of Strickland, which the Administrative Law Judge found "[did] not ring true" (Pet. App. D, p. A-15).

2. There is no substance to petitioner's contention (Pet. 9-10) that the finding that Ing was unlawfully threatened was based on his understanding of Manager Early's words, rather than on an evaluation of the words themselves. The Board found that Early stated to Ing that "[i]f the Union came in he guaranteed there wouldn't be any jobs" (Pet. App. D, p. A-16). These words may properly be found to be coercive without regard to the employee's understanding of them. For, while an employer may

> make a prediction as to the precise effects he believes unionization will have on his company * * *, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

National Labor Relations Board v. *Gissel Packing Co.*, 395 U.S. 575, 618.

Here, there was no objective basis for asserting that the employees would lose thier jobs because of forces beyond the Company's control. Nor was there evidence that management had already arrived at a decision to close or move the plant. Accordingly, the Board properly concluded that Early's statements to Ing constituted threats of job loss and thus violated the Act.[4] See *Amalgamated Clothing*

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[4]The Administrative Law Judge's comment on employee Ing's "understanding" of Early's statement follows a recital of the circumstances which support his finding that the statement could reasonably be deemed to constitute a threat of job loss (Pet. App. D, pp. A-16 to A-17). Moreover, as the Court has recognized, employees "are particularly sensitive to rumors of plant closings, [and] take such hints as coercive threats rather than honest forecasts." *National Labor Relations Board* v. *Gissel Packing Co.*, *supra*, 395 U.S. at 619-620 (footnotes omitted).

Workers v. *National Labor Relations Board*, 424 F.2d 818, 825-826 (C.A. D.C.); *National Labor Relations Board* v. *J.H. Rutter Rex Manufacturing Co.*, 415 F.2d 1133, 1135 (C.A. 6).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

FEBRUARY 1975.